# Cheng Leong Yen v Hooi Lam Construction Sdn Bhd

HIGH COURT (PENANG) - CIVIL SUIT NO 23-97-86
WAN ADNAN J
24 JULY 1989

*Civil Procedure - Leave to defend - Whether there are triable issues such that leave should be given to the defendants to defend*

*Evidence - Oral agreement - Whether defendants should be allowed to prove the existence of a separate oral agreement - Evidence Act 1950, s 92*

The plaintiff had been awarded judgment against the defendants in the sum of $103,500 together with interest and costs. The plaintiff's case was that the defendants had requested him, and the plaintiff had agreed, to act as a broker/agent together with another to initiate and/or set up a development scheme in property in consideration of which the plaintiff and the other party would get a commission and reward. The defendants confirmed in writing their agreement to the effect as follows:

> Re holding nos 193 and 197 mukim 16 DTL Penang
>
> With reference to the above land and our agreement with landlord of the above property. We wish to confirm that you both as brokers of the above land will be jointly entitled to $1,000 per unit if plan for flats is approved by the local authorities. In the event only semi-detached houses are approved, a sum of $2,500 will be paid to you jointly for each unit.

The plaintiff contended that subsequently, the defendants informed him that the layout plan for the proposed block of 15-storey low cost flats (207 units) had been approved by the Majlis Perbandaran Pulau Pinang. Based on this, the plaintiff contended that he was therefore entitled to be paid $103,500 being his share of the promised commission. The defendants contended that the terms of the employment were agreed orally and that the defendants would pay the agreed commission to the plaintiff only upon approval of the layout plan, building and other plans by the relevant authority. Further, they contended that the word 'plan' in their first letter to the plaintiff was meant to refer to the building plan which had yet to be approved. In a joint venture agreement entered into between the defendants and the owner of the land, the defendants had agreed to pay the said owner certain sums 'upon approval of the layout and building plans and upon commencement of building works'.

The defendants thus claimed that, similarly, it was orally agreed between them and the plaintiff that the plaintiff would be paid only upon approval of layout and building plans and upon commencement of building works. The plaintiff relied on s 92 of the Evidence Act 1950 whilst the defendants contended that by virtue of provisos (b) and (c) of s 92 of the Evidence Act they were entitled to prove the existence of a separate oral agreement.

**Held,** allowing the defendants' appeal for unconditional leave to defend with costs:

(1) What had to be decided first, was the true construction of the contract, namely, the written promise of the defendants to pay 'if plan for flats are approved by the local authorities' and secondly, whether that event had happened.

(2) It was not disputed that at the commencement of the action only the layout plan of the proposed block of 15-storey low cost flats had been approved. The building plans had yet to be approved. It was silent as to whether the word 'plan' used by the defendants in their letter referred to 'the layout plan' or 'the building plan'. There was therefore a triable issue as to whether the defendants should be allowed under proviso (b) of s 92 of the Evidence Act 1950 to prove the existence of a separate oral agreement on the matter.

(3) The defendants entered into a formal agreement, a joint venture agreement, for the development of the lands with the landowner in which the defendants had agreed to pay to the landowner certain sums 'upon approval of the layout and building plans and upon commencement of the building works'. The defendants' promise to pay to the plaintiff was merely made in the form of a letter. There was therefore also a triable issue whether the defendants should also be allowed to prove the existence of a separate oral agreement under proviso (c) of s 92 of the Evidence Act 1980.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02-263 of 1989.]

**Cases referred to**

1 *Luxor (Eastbourne), Ltd & Ors* v *Cooper* [1941] 1 All ER 33 (folld)
2 *Christie Owen & Davies Ltd* v *Rapacioli* [1974] 2 WLR 723 (folld)

**Legislation referred to**

Evidence Act 1950 s 92

*Ganesh Ponniah* for the plaintiff.
*Yeang Kok Kheang* for the defendants.

*Cur Adv Vult*

**Wan Adnan J:** This is an appeal against the decision of the senior assistant registrar in giving judgment for the plaintiff in the sum of ringgit one hundred and three thousand and five hundred ($103,500) together with interest and costs.

The case for the plaintiff is that on or before February 1980 at the request of the defendants he had orally agreed to act as a broker/agent together with one Tan Ah Poy to initiate and/or set up a development scheme in property known as holding nos 193 and 197 mukim 16 daerah Timur Laut Penang and in consideration thereof the defendants had agreed to pay the plaintiff and the said Tan Ah Poy commission and reward. The defendants' agreement was confirmed in writing contained in the defendants' letter to the plaintiff and the said Tan Ah Poy dated 13 February 1980. The letter reads as follows:

> Re holding nos 193 and 197 mukim 16 DTL Penang
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> With reference to the above land and our agreement with landlord of the above property. We wish to confirm that you both as brokers of the above land will be jointly entitled to $1,000 per unit if plan for flats is approved by the local authorities. In the event only semi-detached houses are approved, a sum of $2,500 will be paid to you jointly for each unit.

The plaintiff further says that by the defendants' letter dated 15 January 1985 the defendants had informed him

that the layout plan for the proposed block of 15-storey low cost flats (207 units) had been approved by the Majlis Perbandaran Pulau Pinang. The letter reads as follows:

> Further to our letter to you dated 13 February 1980, we wish to inform you that the layout plan for the proposed one block of 15-storey low cost flats (207 units) has been approved on 13 December 1984 by Majlis Perbandaran Pulau Pinang.
>
> Kindly come to our office within seven (7) days from date of this letter to solve/discuss problems with the landowner Mr Tan Cheng Kang in connection with the overall development of the above-mentioned low cost flats. We are writing this letter to both of you because both of you are brokers of the above land. If both of you do not come to our office within the stipulated time above-mentioned, then your right/interest as brokers as mentioned in our letter to you dated 13 February 1980 will be void and of no value.

The plaintiff contends that he was therefore entitled to be paid $103,500 being his share of the promised commission.

The defendants by their defence contend that the terms of the employment were agreed orally and that the defendants would pay the agreed commission to the plaintiff only upon approval of the layout plan, building and other plans by the relevant authority. Further, they contend that the word 'plan' in their letter dated 13 February 1980 was meant to refer to the building plan which was yet to be approved. In his affidavit affirmed on 13 January 1987 Soon Wan Kim the managing director of the defendants says that a joint venture agreement was entered into on 29 January 1980 between the defendants and the owner of the lands in question. In the said joint venture agreement the defendants had agreed to pay the said owner certain sums 'upon approval of the layout and building plans and upon commencement of building works'. He further affirmed that similarly it was orally agreed between him as the defendants' representative and the plaintiff that only upon approval of layout and building plans and upon commencement of building works that the plaintiff would be paid.

The plaintiff relies on the provisions of s 92 of the Evidence Act 1950 which is as follows:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.

The defendants contend that by virtue of provisos (b) and (c) of s 92 of the Evidence Act they are entitled to prove the existence of a separate oral agreement. Provisos (b) and (c) read as follows:

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
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> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under such contract, grant or disposition of property, may be proved;

The legal position in a case where an agent has been promised a commission was stated in the House of Lords case of *Luxor (Eastbourne), Ltd & Ors* v *Cooper*[1] as follows:

> ... and the legal position can be stated thus: If according to the true construction of the contract the event has happened upon the happening of which the agent has acquired a vested right to the commission (by which I mean that it is debitum in praesenti even though only solvendum in futuro), then no act or omission by the principal or anyone else can deprive the agent of that right; but until that event has happened the agent cannot complain if the principal refuses to proceed with, or carry to completion, the transaction with the agent's client.

Again in *Christie Owen & Davies Ltd* v *Rapacioli*[2] James LJ on behalf of the Court of Appeal said:

> To ascertain whether an agent is entitled to commission one must look to see what is the event on the happening of which commission is payable. If the event has happened, the commission is due; otherwise, it is not.

In this case what has to be decided first, is the true construction of the contract, namely, the written promise of the defendants to pay 'if *plan* for flats is approved by the local authorities', (emphasis is added); and secondly, whether that event had happened. It seems that for any land development two types of plans are required to be approved, namely, the layout plan and the building plans. It is not disputed that at the commencement of the action only the layout plan of the proposed block of 15-storey low cost flats had been approved. The building plans were yet to be approved. The word used by the defendants in their letter dated 13 February 1980 is only 'plan'. It is silent as to whether it refers to 'the layout plan' or 'the building plan'. In my view there is a triable issue whether the defendants should be allowed under proviso (b) to s 92 of the Evidence Act 1950 to prove the existence of a separate oral agreement on the matter.

On 29 January 1980, a joint venture agreement for the development of the said lands was entered into between the defendants and the landowner. The plaintiff was instrumental in bringing about the agreement. This was a formal agreement and in it the defendants had agreed to pay to the landowner certain sums 'upon approval of the layout and building plans and upon commencement of the building works'. The defendants' promise to pay to the plaintiff was merely made in the form of a letter. In my view there is also a triable issue whether the defendants should also be allowed to prove the existence of a separate oral agreement under proviso (c) to s 92 of the Evidence Act 1950.

I therefore find that there are triable issues as regards the construction of the contract which should go for trial. I therefore allowed the appeal with costs and granted the defendants unconditional leave to defend.

*Appeal allowed.*

Solicitors: *Geh Cheng Lok & Co; Yeang & Co.*

Reported by *Yap Shao Sin*

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## Cham Yoon Liang v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) - CRIMINAL APPLICATION NO 44-9-89
MOHTAR ABDULLAH JC
22 JULY 1989

*Preventive Detention - Habeas corpus - When period of detention to commence and end - Date of making the order different from date of commencement of detention - Bona fides of Minister - Detention prior to detention order - Whether authorized - Onus on detaining authorities to justify detention - Failure to comply strictly with statute - Whether defects in earlier detention made whole detention bad in law - Technical defects relied upon by applicant - Dangerous Drugs (Special Preventive Measures) Act 1985, ss 3(2)(a), (b), (c) & 6(1)*

The applicant alleged that he was arrested on 11 February 1989 in the purported exercise of powers under the Dangerous Drugs Act 1952 and was further detained in the purported exercise of powers under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') for a total of 74 days with no charges preferred against him in a court of law. On 22 April 1989 the Deputy Minister ('the Minister') of Home Affairs made a detention order directing that the applicant be detained for two years with effect from 25 April 1989. The applicant contended that the Act allowed detention for two years from the date of the order, ie the making or signing the order, and the expiry of the detention on 24 April 1991 would exceed two years from the making of such order by the Minister.

The applicant did not specifically challenge the legality of the detention from 11 February 1989 up to the issuance of the detention order. However the court allowed further affidavits to cover the relevant periods of detention.

**Held,** granting an order for habeas corpus:

(1) From the whole scheme of the Act, the detention order made on 22 April 1989 for a period of two years from 25 April 1989 was correct, proper and not in violation of s 6(1) of the Act. The Minister had stated in his affidavit that the detention order was made in good faith and the Act has been properly applied to the applicant. The court does not question the satisfaction of the Minister so unequivocally stated nor doubt the bona fides of the Minister.

(2) In a habeas corpus proceeding under the Criminal Procedure Code where the evidence show that the detainee has been under continuous detention purportedly under separate laws or by separate authorization, it is incumbent upon the authorities to justify the detention by the production of the relevant lawful detention order or authorization.

(3) There was no affidavit affirming the validity of the detention of the applicant from 11 February 1989 to 25 February 1989 under the Dangerous Drugs Act. No order of any magistrate under s 117 of the Criminal Procedure Code was produced to cover the detention beyond the initial 24 hours of the original arrest. In the circumstances a doubt exists as to whether the detention of the applicant for the initial 14-day period was legal.

(4) Under the Act, the police can detain the applicant, for the purpose of investigation, for a period of 60 days. The provisos in s 3(2) of the Act are clear as regards detention. From the affidavits filed, the detention for the first 48 hours seems lawful. However, a copy of the purported authorization beyond 48 hours under s 3(2)(b) was in fact an authorization under s 3(2)(c) for further detention for an additional 46 days. Mere averment in the affidavit without the production of the relevant authorization is insufficient to discharge the burden to show lawful detention.

(5) There was also no proper authorization under s 3(2)(c) for the detention beyond 14 days because (a) the police officer was below the rank of deputy superintendent; (b) there was no affirmation that he reported the matter to the Inspector-General; (c) if the detention was valid, there was a gap of 11 days between that detention and the commencement of the detention order by the Minister.

(6) The allegations by the respondents that by a mistake of fact a wrong form was used and that the cyclostyled forms adopted were intended for administrative convenience and records purposes were a misconceived view of a police officer's responsibility under the Act. Although there are no prescribed forms under the Act, those in use were authorized by the Attorney-General's chambers and therefore officially sanctioned for the purpose of the exercise of power of detention as stipulated by the Act. The use of the wrong form cannot be a mere irregularity in view of the fact that each form prescribes for the different exercise of powers under different provisions of the law by officers of different rank.

(7) Section 3(2)(c) of the Act is strict and clear. The deputy superintendent shall report only to the Inspector-General or a police officer designated by him. The affidavit did not show that the procedural requirement had been complied with.

(8) Although the Minister had acted bona fide, there were vital defects in the earlier periods of detention which were bad in law. A person applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.

[*Editorial Note*: The respondents have appealed to the Supreme Court vide Civil Appeal No 5-72 of 1989.]

**Cases referred to**

1 *Koh Yoke Koon v Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45; [1988] 2 MLJ 301 (folld)
2 *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184 (folld)

**Legislation referred to**

Criminal Procedure Code s 117
Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2)(a), (b), (c), 6(1)